

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, )  
Petitioner )  
-VS- ) CA No. 07-12064-PBS  
TODD CARTA, ) Pages 1 - 56  
Respondent )

HEARING

BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

United States District Court  
1 Courthouse Way, Courtroom 19  
Boston, Massachusetts  
June 14, 2011, 3:00 p.m.

LEE A. MARZILLI  
OFFICIAL COURT REPORTER  
United States District Court  
1 Courthouse Way, Room 7200  
Boston, MA 02210  
(617)345-6787

1 A P P E A R A N C E S:

2  
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for the Petitioner.

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5th Floor, Boston, Massachusetts, 02110, for the Respondent.

7  
8 I N D E X

9 CLOSING ARGUMENTS PAGE

10 By Mr. Gold: 3

11 By Ms. Serafyn: 31

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1 P R O C E E D I N G S

2 THE CLERK: Court calls Civil Action 07-12064, United  
3 States v. Todd Carta. Could everyone identify themselves for  
4 the record.

5 MS. SERAFYN: Good afternoon, your Honor. Jennifer  
6 Serafyn and Eve Piemonte-Stacey for the United States.

7 THE COURT: Thank you.

8 MR. GOLD: Good afternoon, your Honor. Ian Gold for  
9 Mr. Carta, the Federal Defender's Office. With me is Tamara  
10 Fisher, also of that office.

11 THE COURT: Good, thank you. So I'm trying to think,  
12 since this is a civil case, I actually think, Mr. Gold, you go  
13 first.

14 MR. GOLD: We were talking about that, and we weren't  
15 sure. We've done it different ways in different ones --

16 THE COURT: If you've agreed on something else, I'll  
17 go with your agreed-upon order, but otherwise plaintiff goes  
18 last.

19 MR. GOLD: I'm happy to go first. That's fine.

20 THE COURT: But I don't care really. I've read both  
21 memos, so this isn't going to have the same closing-to-a-jury  
22 feeling to it.

23 MR. GOLD: I hadn't seen it that way.

24 CLOSING ARGUMENT BY MR. GOLD:

25 MR. GOLD: I wanted to start out, your Honor, just

1 bringing the Court back to when we closed the evidence in the  
2 case. At that time it came to the Court's attention, we  
3 brought it to the Court's attention that there was no treatment  
4 available for people with sexual behavior problems at Devens  
5 who were pre-commitment like Mr. Carta. We then worked it out  
6 that he's in one-on-one counseling with a Dr. Schoeller over  
7 there. Since the time of the close of the evidence, he's been  
8 doing these weekly one-on-one sessions and has completed a  
9 rational-thinking program, which was a six-week psychoeducational  
10 class or psychoeducational group, and also an anger management  
11 group. And I suppose, as a formal matter, we'd like to have  
12 that in, we'd like to have that before the Court.

13 THE COURT: You want to move to reopen the evidence?  
14 Is there a certificate or something? Or you want to just make  
15 a proffer?

16 MR. GOLD: I'd like to make a proffer. In lieu of a  
17 certificate, we have a brief memorandum from Dr. Schoeller -- I  
18 tried to reach out to her today -- simply stating that he  
19 finished the rational-thinking group, but a proffer along the  
20 lines of what I just said I think would be sufficient from our  
21 perspective, that he's engaged and continuing to be amenable to  
22 bettering himself in that way.

23 THE COURT: Fine.

24 MR. GOLD: Very good.

25 THE COURT: By "fine" meaning I'm taking that proffer

1 that he finished those two programs, and if you find out that's  
2 not true, let me know.

3 What's the problem?

4 MS. SERAFYN: There is no problem, your Honor. I can  
5 certainly let you know if that isn't true, but I accept  
6 Mr. Gold's representation that it is. I would just note that  
7 neither of those programs are related to sex-offender-specific  
8 treatment.

9 THE COURT: Thank you. I will take that proffer as  
10 well.

11 MR. GOLD: All right. And I would just respond that  
12 Dr. Schoeller is a therapist with the sex offender program and  
13 is doing one-on-one therapy with Mr. Carta.

14 THE COURT: Sex offender?

15 MR. GOLD: Well, Mr. Carta is a sex offender, and he's  
16 in treatment with Dr. Schoeller dealing with the primary issues  
17 that he presents, so, yes, sex offender therapy.

18 THE COURT: Actually, I'm not sure I'm willing to take  
19 that proffer, since it was represented to me that they weren't  
20 willing to do it.

21 MS. SERAFYN: Right, it's my understanding that it's  
22 not sex offender therapy, that --

23 THE COURT: If it's disputed, we're going to leave it  
24 alone. He's getting psychological treatment, and he is a sex  
25 offender, but I am not going to take a proffer as to what's in

1 it at this point.

2 MR. GOLD: Well, we'd have to have her in, but let me  
3 just start by doing some argument, which I think is that I  
4 wanted to start by simply saying that the commitment of  
5 individuals like Mr. Carta is a very high-stakes endeavor. If  
6 Mr. Carta is committed, the Court has jurisdiction over him.  
7 He will be under the power of the Court potentially for the  
8 rest of his life. I know that I have experience, I have a  
9 client like Mr. Shields who recently went through the program  
10 and benefitting from some access to it through the process of  
11 representing the other --

12 THE COURT: We just let Mr. Shields go actually.

13 MR. GOLD: Right. No, I'm aware of that. I'm aware  
14 of that, and I --

15 THE COURT: That sounds too broad. We just released  
16 him subject to conditions of release, but it was by agreement  
17 of everyone. So I think he would say, Shields, that it was a  
18 fabulous program. I mean, I think he got a lot out of it.

19 MR. GOLD: Right. And, Judge, I want to be very  
20 candid, and I have a client down there who is also benefitting  
21 from the program. And as an advocate for Mr. Carta, my concern  
22 is that we lose sight of the high-stakes nature of what we're  
23 doing, which is ordering outside of our typical criminal  
24 procedures the civil commitment by dint of a mental condition  
25 of an individual who has serious difficulty controlling

1 themselves; and that it's not just about whether Mr. Carta may  
2 have in the past or may in the future benefit from the  
3 treatment that's offered down there, but whether as a  
4 constitutional matter he's so out of control of his behavior  
5 that he must receive that treatment while confined.

6                   And in this go-round we didn't receive the evidence,  
7 but the evidence is in from Mr. Carta's probation officer and  
8 from Mr. Carta's treatment provider, who are available to him  
9 in Connecticut, that he has a regime of which he's going to be  
10 a part, quite similar, I would submit, to the regime that  
11 Mr. Shields is released under now. And so it's our position --  
12 I was looking at the Wetmore case, the public Wetmore case the  
13 other day, and when we first litigated this case in front of  
14 Judge Tauro, the argument was, and I think remains on some  
15 level, that Mr. Carta does not fit into the prototype, the  
16 basic prototype that we would have in mind of the sexually  
17 dangerous person, and that is for one basic reason, and that is  
18 because he has not been sanctioned, suffered a consequence, and  
19 then gone on to reoffend. This is the behavioral data, if you  
20 will, which is in almost every case that I've reviewed the most  
21 persuasive piece of evidence and I think the type of evidence  
22 that this Court has referred to in ordering the commitment of  
23 someone based on this serious difficulty controlling behavior.

24                   The testimonial kind of terrain is, we have two  
25 experts, Dr. Bard and Dr. Prentky, who have testified that in

1       their opinions Mr. Carta is not a sexually dangerous person  
2       under the statute. The government has proffered Dr. Amy Phenix  
3       who testified that he is.

4               The standard of proof is clear and convincing  
5       evidence, taking into account this high liberty interest that I  
6       started out talking about. And that is an evidentiary  
7       threshold with some bite, and we would argue that it's not met  
8       in this particular case. When the First Circuit remanded, the  
9       First Circuit essentially found that Judge Tauro's finding was  
10      clearly erroneous when Judge Tauro found that the government  
11      had not met its burden by clear and convincing evidence of  
12      establishing that there was a mental disorder here, and so I  
13      wanted to begin speaking about the second prong and then  
14      revisit hebephilia afterwards.

15               THE COURT: Well, and also let's just put some cap on  
16      it. How long do you think you'll need?

17               MR. GOLD: Oh, to finish this statement? Ten --

18               THE COURT: Yes, to do your closing argument.

19               MR. GOLD: Oh, this argument? Ten, fifteen minutes.

20               THE COURT: That's perfect.

21               MR. GOLD: Yes. The Court has seen a lot of  
22      testimony, not just in this case but in others, about the risk  
23      assessment instruments that are used, are brought forth to kind  
24      of justify these experts' opinions when they make their  
25      opinions way back in the Shields case, and it really is -- it

1 started with the basic Static-99. Now we have a newfangled  
2 instrument with kind of new trappings. And it really is quite  
3 interesting, I would submit, that since this statute was passed  
4 we've had such changes in this field, and this is a field where  
5 courts have to find by a certain level of proof that someone  
6 meets a particular threshold.

7 Now, in preparing this, we've been paying close  
8 attention to what this Court has written and other courts, and  
9 I again go back to the question of whether there is serious  
10 difficulty controlling behavior. And we don't start with  
11 the --

12 THE COURT: Can I interrupt you?

13 MR. GOLD: Yes.

14 THE COURT: Have other courts struggled with this  
15 hebephilia issue? Or more accurately, have they written on the  
16 hebephilia issue?

17 MR. GOLD: I am not aware of -- I think that there are  
18 state court decisions accepting the diagnosis. When we first  
19 made the argument to Judge Tauro, the psychiatric literature  
20 was at a particular state that it isn't anymore. We made  
21 reference to the Abregana case, where it was our position that  
22 the court in that case, which was a District Court in Hawaii,  
23 took evidence from someone who posited that hebephilia may or  
24 may not be a disorder; and then our read of that opinion is,  
25 the court found that it was a disorder but not a serious

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1 disorder. That was a sort of finding where most of the finding  
2 in that case was that the person was not dangerous. That was  
3 the Abregana case, a federal case.

4 Your Honor had heard briefly testimony that wasn't  
5 developed by Dr. Kriegman about the issue, and then there was  
6 one other case --

7 THE COURT: Nothing subsequent, is there?

8 MR. GOLD: No. And since we have the further  
9 developments of the literature, there has been nothing that I  
10 have seen of any court wading in and really taking a bite out  
11 of the issue.

12 But to return back, both Dr. Prentky and Dr. Bard find  
13 that Mr. Carta is not dangerous. I want to talk about how they  
14 justify those opinions, but first I think it's important to  
15 start with: These cases, the instruments, the offenses, I  
16 submit, just my own interactions with these cases, have a  
17 dehumanizing sort of impact. You know, you start focusing  
18 perhaps on the wrong things.

19 And what we have with Mr. Carta is at the bottom  
20 someone who has been changed fundamentally by his experiences.  
21 He's someone who it's true, his first sanction, his first  
22 serious sanction or interaction with the criminal justice  
23 system for a heavy sentence is this sentence that he's serving  
24 right now. In contrast to a lot of the other people who have  
25 been targeted for this type of treatment, there is no sexual

1 misconduct of any kind over the past nearly a decade that we  
2 can see in his record.

3 He is someone who opened up and told great volumes to  
4 therapists in the sex offender treatment program there and did  
5 in fact voluntarily -- and this is a distinction which is  
6 important in the literature -- voluntarily withdrew from that  
7 program, but still was exposed, both in that program and a  
8 significant program before that, the Code Program which is  
9 offered by the Bureau of Prisons, and it was a yearlong also  
10 residential program where Mr. Carta was exposed, I think for  
11 the first time, to this programming that the Bureau of Prisons  
12 offers. A lot of the substrate of this programming is the  
13 same. It's cognitive behavioral ideas which targets criminal  
14 thinking and so forth, and Mr. Carta in fact testified, and  
15 testified, I think, very feelingly and well, about his  
16 experiences and how he views them today.

17 And that is where we start with a risk assessment, and  
18 I think that going to the instruments simply demonstrates that  
19 this is not someone who is of that level or that order of  
20 someone who is at high risk to reoffend such that they need to  
21 be confined, as opposed to allowed to be at liberty pursuant to  
22 their original criminal sentence.

23 These statutes were passed. I've read in one area  
24 Eric Janus, a law professor who writes about these statutes,  
25 that when they first emerged in the early 1990s there was a

1 prevention gap. There had been an increase in determinant  
2 sentencing, a decrease in the availability of parole, and so  
3 you had people that couldn't be committed under typical civil  
4 statutes, because they weren't mentally disordered in the  
5 traditional way, being released without any supervision  
6 whatsoever. And you had some crimes that followed, and then  
7 this Washington state predator statute emerged, and that's the  
8 model that's been copied from then on out; in fact, in the  
9 twenty states that have them. That's not the case here.  
10 Mr. Carta would be released, if released, to a panoply of  
11 supervision, treatment, and other types of protections.

12 When an expert like Dr. Prentky or Dr. Bard or  
13 Dr. Phenix goes about the task of determining whether someone  
14 is at high risk to reoffend, they all make reference to this  
15 instrumentation. I think the best way for the Court to look at  
16 it is: Here is a professional who is needing to come to a  
17 determination that needs to be communicated to the court and is  
18 taking defensible steps to do it in a transparent and useful  
19 way. And both Dr. Bard and Dr. Prentky come about it, have  
20 different ways up the mountain. Dr. Bard uses the  
21 instrumentation that he did, the Static-99-R. Dr. Prentky  
22 stated that the Static-99 didn't apply in the case, although he  
23 made reference to its scoring, and used another instrument  
24 which is used in the field, this SVR-20.

25 The point is, is that all of these instruments started

1 to coalesce around this notion of moderate risk. The  
2 difference of opinion was whether that moderate risk should be  
3 elevated in some way. And there was a lot of testimony that  
4 the Court heard -- and we kind of chew through a lot of that in  
5 these papers -- about the dynamic factors.

6 The comment that I have about Dr. Phenix's treatment  
7 of the dynamic factors is that she treats them in a sense like  
8 static factors. The information that she goes to when she  
9 talks about them are anecdotes or information about Mr. Carta  
10 very early on in his BOP career or from his life, and it's a  
11 different operation than what Dr. Bard does, which is simply  
12 assess Mr. Carta as a person as he is right now, and is he  
13 exhibiting any pattern of disordered thinking or behavior right  
14 now which would tend to indicate that what the instruments are  
15 showing is not particularly accurate?

16 I want to go after Dr. Phenix in a couple of ways. I  
17 think that the government on these facts doesn't meet the  
18 burden. Mr. Carta does not fit the threshold despite his  
19 disclosures. He's not someone who demonstrates this lack of  
20 capacity to control, which is the sine qua non of the statute.  
21 But, also, when the Court is evaluating and going through  
22 Dr. Phenix's testimony, I would make reference to two broad  
23 changes. One is the way that she dealt with the  
24 instrumentation over the course of this very case, and the  
25 other is the change in the way that she conceived of the

1 diagnosis. And both of these things are important. I think  
2 they affect the weight that the Court should give to her  
3 testimony in evaluating it against the testimony of the other  
4 two.

5 The first is, when we start at the report that  
6 Dr. Phenix produced in this case in 2008, she was using a  
7 method which the Court had heard a great deal about by that  
8 time in the Shields case, a clinically adjusted actuarial  
9 method. You use the actuarial instrument; you make clinical  
10 adjustments as appropriate. However, based on developments in  
11 the field, by the time that we tried the case in February of  
12 2009, she'd changed her method. She called it a "pure  
13 actuarial method." That is, she was saying --

14 THE COURT: When did we try the case?

15 MR. GOLD: Well, we tried the case in February of  
16 2009.

17 THE COURT: I see. So you're referring to the one  
18 before me?

19 MR. GOLD: That's right, and I'm coming up to the one  
20 that we did. But the testimony is in. We have it in front of  
21 us. We refer to it in the papers. She was using a pure  
22 actuarial method. That is, she was stating that her opinion  
23 was -- she's a responsible professional choosing the best  
24 methodology to come up with assessing risk in this high-stakes  
25 enterprise. She said, "I'm most accurate, most accurate when I

1 use the actuarial instruments and do not adjust with the  
2 dynamic factors." That's what she said. That was her  
3 testimony. She used the dynamic factors to put someone within  
4 a range that the actuarials gave her, but she said the  
5 actuarials were the end-all and be-all, if you will.

6                   By the time that we got to the trial in this case, she  
7 had abandoned that method and was back to using a clinically  
8 adjusted actuarial method, but the actuarial method had been  
9 very affected by this new dispositive or kind of  
10 outcome-determinative choice that comes before you use the  
11 actuarials, which is, what sample do you compare a respondent  
12 to? So it's not enough to get a 6 on the Static-99. Is it a 6  
13 compared to the high-risk sample? Is it a 6 compared to the  
14 routine sample? And that is now the operation that she does,  
15 and she talks about using these dynamic factors in that  
16 context, of using them to determine whether he should be  
17 compared to the high-risk sample or the low-risk sample.

18                   And it's very easy to get lost in the weeds when  
19 talking about this detailed information. Some of the  
20 information that we brought that I think is important, for  
21 example, is that the high-risk sample, although the virtue of  
22 all these new samples is that they're new and more contemporary  
23 and therefore presumably giving us more accurate information,  
24 this high-risk sample is dominated by this group from the  
25 Massachusetts Treatment Center at Bridgewater which was

1 released starting in 1959 to the 1980s, and there we are  
2 starting to suggest that there were certain choices in this  
3 enterprise which prejudiced respondents like Mr. Carta,  
4 perhaps, and were not necessarily as accurate as we might  
5 think.

6 Now, on one level, this can all just be the progress  
7 of science. Dr. Phenix is trying to come up with the methods  
8 which best are adapted to the task of communicating good risk  
9 information to the Court. What we noticed when we parsed  
10 through all this information is how her opinions and the  
11 emphases of her opinions changed over the course of the two  
12 trials, and this is in fact something like a natural  
13 experiment. And when she was doing a pure actuarial method,  
14 she said that the actuarials happened to be in this particular  
15 case high, they were high. She had a high score on the  
16 Static-99. She had not scored this Static-2002 yet, and she  
17 scored this instrument called the MnSOST-R, this Minnesota Sex  
18 Offender Screening Tool, and that was high.

19 During the testimony in that case, we uncovered  
20 through cross-examination that she'd made errors in scoring  
21 this instrument. And as a footnote, your Honor, it's important  
22 to make reference, just in terms of the nature of the community  
23 and the information that's coming to the courts, that the  
24 MnSOST-R is not commonly used, was not used by the other  
25 experts in this case, and is in fact developed by Dr. Phenix's

1 husband.

2 Now, she made errors scoring on it --

3 THE COURT: Now, this is the Tauro trial, right?

4 MR. GOLD: No. This is the Tauro trial and this  
5 trial. She made --

6 THE COURT: She took some brand-new -- can I say,  
7 you're really in the weeds now, and at the end of the day,  
8 don't they all sort of agree that these actuarial tables put  
9 him basically at moderate risk to reoffend?

10 MR. GOLD: Yes, they do, they do, but Dr. Phenix, I  
11 think -- you know, it's --

12 THE COURT: She says that, right?

13 MR. GOLD: No. What I'm trying to do is hoist the  
14 lady on her own petard, and the only way to do it is to sort of  
15 develop some detail. I definitely don't want to burden the  
16 Court with detail that is not necessary to the purpose. I  
17 mean, I think it's important to lay out. But to take a step  
18 back to this level of generality, the instruments say moderate  
19 risk. Dr. Phenix says the moderate risk is overridden in this  
20 case by the presence of these dynamic factors. The dynamic  
21 factors we argue go to Dr. Bard because her treatment of the  
22 dynamic factors is a little wooden; she finds the information  
23 for them way back in the past, treats them like static factors.  
24 That's one point.

25 We also would like to point out that when she had high

1 actuarials, which she doesn't anymore, she was an actuarial  
2 person. Now that she's got moderate actuarials, she's a  
3 dynamic factors person; and that when you're assessing a person  
4 like Mr. Carta, we had the benefit of having him testify on the  
5 stand -- I think he testified truthfully and well -- and those  
6 are the dynamic factors: How is someone considering or  
7 reflecting on their own experience in the here and now?

8 So, I mean, that's the nutshell on risk. We do a lot  
9 to try to point out these features of her testimony in the  
10 papers.

11 THE COURT: So you're basically encouraging me to use  
12 the actuarial tables at moderate risk and saying that's not  
13 enough to meet the clear and convincing because his dynamic  
14 factors on the stand show that he's moving in the right  
15 direction?

16 MR. GOLD: That's a way to put it. Before we get to  
17 the actuarials, I focus on this important fact of, what  
18 evidence do we have that he can't control himself? And, again,  
19 I want to say it again, although I've said it before, this  
20 evidence of reoffending after a sanction has been really the --

21 THE COURT: Right, that's the really strong evidence  
22 in your corner.

23 MR. GOLD: -- defining piece of evidence, and that  
24 evidence is not here. Then with respect to going to the risk  
25 assessment instruments, and it's not entirely clear how this

1 assessment of risk goes back to determining whether someone's  
2 able to control themselves, but to the extent that it is  
3 evidence, the moderate evidence is helpful. We would argue  
4 that for this type of determination at this standard of proof,  
5 you would need these high levels, you would look for it, and it  
6 isn't present here.

7 With respect to the dynamic factors, that point is  
8 well-taken. That point is well-taken that certain things can  
9 override these actuarials; but that looking at Dr. Phenix's  
10 treatment of these dynamic factors, I'm encouraging the Court  
11 to be somewhat skeptical of that, to look at Dr. Bard or look  
12 at the holistic determinations that you get from Dr. Prentky  
13 and Dr. Bard about where Mr. Carta's functioning is right now,  
14 and the importance, the relative importance, of these pieces of  
15 information that we all agree on: There is no offending,  
16 there's no evidence of particular types of acting out in prison  
17 and so forth, and what is the relative importance of that data  
18 or the absence of it to the determination?

19 I think our dispute with the government is going to be  
20 about the importance of these dynamic factors and how the Court  
21 should look at this sequence where Mr. Carta left treatment, he  
22 withdrew from treatment.

23 THE COURT: Right.

24 MR. GOLD: And we've had testimony twice about that,  
25 and the Court doesn't have the benefit -- we could have brought

1 the folks back in, but we elected to use the paper record, and  
2 that's what we have. Dr. Wood was an intern who was  
3 supervising Mr. Carta during this period. I think the Court  
4 has looked at his testimony. It's there in the record. And  
5 Dr. Bard, in my view, gives a very, in the prior trial and also  
6 here, a clinically informed interpretation of what that is.

7 THE COURT: So Bard, has he ever been a  
8 court-appointed expert?

9 MR. GOLD: He was a qualified examiner. Has he been a  
10 court-appointed expert in --

11 THE COURT: In any of these sex offender cases?

12 MR. GOLD: Well, he's a court-appointed expert now  
13 actually. He's not ours. He's the court-appointed.

14 THE COURT: Right, in this one, but other than this  
15 one?

16 MR. GOLD: Do you know?

17 MS. PIEMONTE-STACEY: Not to our knowledge.

18 MR. GOLD: No. I mean, he was a qualified examiner  
19 for about a decade until --

20 THE COURT: Until Judge Tauro appointed him, but it's  
21 the only time he's been a court-appointed expert?

22 MR. GOLD: I think that's right. I think that's  
23 right. I think this is the only case that he participated in.

24 THE COURT: And Prentky was mine when?

25 MR. GOLD: In the Wetmore case.

1                   THE COURT: Wetmore.

2                   MR. GOLD: Yes. And I would encourage the Court to  
3                   look at Wetmore. We think Wetmore helps us. And this is not  
4                   to disparage Wetmore but to look at the important distinctions  
5                   between, and it's important, I think.

6                   THE COURT: It's certainly a harder case than  
7                   Mr. Wetmore.

8                   MR. GOLD: Yes. Now, I want to -- the other issue is  
9                   going --

10                  THE COURT: Let me --

11                  MR. GOLD: Go ahead.

12                  THE COURT: I have somebody who has been attracted to  
13                  thirteen-year-olds, has had three relationships with  
14                  thirteen-year-olds and continues to be attracted to  
15                  thirteen-year-olds, and likely has or by clear and convincing  
16                  has hebephilia. So I do agree with you that this all boils  
17                  down to whether he has the capacity to control himself and  
18                  whether the government has proven by clear and convincing that  
19                  he doesn't. And so I'm always struggling with these actuarial  
20                  instruments, which I haven't had the need to put much weight on  
21                  because the other three cases I had were so clear. So you're  
22                  saying, in this case, they cut in your favor basically.

23                  MR. GOLD: Yes. Well, they cut in our favor. They're  
24                  information that I think is on our side of the scale, that's  
25                  right. I think that --

1                   THE COURT: But they hit moderate, not high, as in  
2 some of these other cases.

3                   MR. GOLD: That's right. And, also, the Court  
4 actually observed during the course of the trial that  
5 Dr. Phenix had scored a new instrument to the Court, the  
6 Static-2002. They're always trying the elaborate on these  
7 instruments. The Static-2002 is supposedly an improvement over  
8 the Static-99, in that it measures deviance over here and  
9 anti-sociality over here. Mr. Carta's risk comes from this  
10 anti-sociality. This is an observation which is also reflected  
11 in Dr. Prentky's scoring of the SVR-20, another instrument  
12 which is sort of not an actuarial.

13                  THE COURT: Right, because he's in the past, and the  
14 past predicts the future. He's got this antisocial personality  
15 disorder, which does not make him sexually dangerous but could  
16 affect whether the treatment helps or not.

17                  MR. GOLD: It could, although, you know, a frequently  
18 observed fact about antisocial personality or these personality  
19 traits which are maladaptive, which I've learned, is that they  
20 decline with time. And I think that's evident in people like  
21 Mr. Carta, who the way he presents, the way he is on the stand  
22 or with counsel, over time. He's now an older person and is  
23 not the person he was when he was doing these things that are  
24 the basis of these diagnoses in the first place.

25                  I do want to speak separately about the diagnosis. I

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1 object to the Court and the government's rhetoric also,  
2 Dr. Phenix too, about the thirteen-year-olds. I think --

3 THE COURT: It's not rhetoric. It's what the evidence  
4 was.

5 MR. GOLD: Well, but let me --

6 THE COURT: "Rhetoric" is a little harsh. He said it.

7 MR. GOLD: Well, no, let me parse out the rhetoric  
8 from the -- because I think it's important. There are three  
9 thirteen-year-olds, and the government used language during the  
10 course of the trial that he was continually offending against  
11 thirteen-year-olds over the period of a decade, right? But  
12 there is one incident with one thirteen-year-old. And, again,  
13 we know that that is a thirteen-year-old because Mr. Carta  
14 believes that the person was thirteen. And we can't forget  
15 when talking about these diagnostic ideas that thirteen is a  
16 proxy for something, a level of sexual development. So at the  
17 end of the day, it's an arbitrary cutoff which is used to  
18 usefully approximate what the issue is, which is level of human  
19 development.

20 There is another thirteen-year-old who we can't  
21 forget. The government often in its papers says he offended  
22 against a thirteen-year-old 30 to 40 times by his own  
23 admission, 20 to 30 times over a two- to four-year period, but  
24 the person isn't thirteen for that period of time.

25 Now, if what we're trying to do with these diagnoses

1 is zero in on someone who has this pathological sexual  
2 interest, it starts to seem less like someone who is looking  
3 for the younger persons and someone who is looking for the  
4 older persons. And then the other is a thirteen-year-old that  
5 Mr. Carta did not in fact have any physical interaction with  
6 but who was involved with, when he was dating the  
7 seventeen-year-old, was involved with an interaction where he  
8 watched the seventeen-year-old and the thirteen-year-old have  
9 sexual contact. Those are the three.

10 THE COURT: I actually don't remember that.

11 MR. GOLD: Yes, the third victim, that is the account  
12 of what happened. Those are the three things. John is the --

13 THE COURT: But just assume -- I mean, you started off  
14 with where I think you correctly started off, which is, the  
15 issue is here lack of capacity to control.

16 MR. GOLD: Yes.

17 THE COURT: So assuming for a minute I find he's still  
18 attracted to thirteen-year-olds because he said that, and in  
19 fact he has molested thirteen-year-olds, the issue is still,  
20 could he control himself? And it's a little harder in this  
21 case because those actuarials, which you say, the actuarial  
22 tables only put him at a moderate risk, and all the other  
23 people I've seen put him at the high risk. Is that, I mean --

24 MR. GOLD: Yes, but, you know, I want to put the  
25 actuarials in their place. I mean, Dr. Phenix is the actuarial

1 person. I talked about hoisting her on her own petard --

2 THE COURT: You just spent so much time on actuarials,  
3 so that's why I'm asking. You're asking me to actually look at  
4 them and rely on them.

5 MR. GOLD: Well, let me take a step back, Judge, and  
6 let you know what I'm doing. I want to impeach Dr. Phenix.  
7 That's what I want to do. I want to demonstrate to the Court  
8 or put some parts of her opinion into context.

9 She is the actuarial lady. She justifies herself by  
10 virtue of these instruments, and therefore it's important how  
11 she treats them and how she treats them differently over time.  
12 She is the one who says that these actuarials are moderate.  
13 Dr. Bard says that too. Dr. Prentky goes about the risk  
14 assessment in a different way.

15 We would encourage the Court to look at the testimony  
16 of the experts, as the Court has said, considered as a whole,  
17 considering their interaction with Mr. Carta and their  
18 consideration of all the factors, including these risk  
19 assessment tools, and value our guys over theirs. I mean,  
20 that's what we want at the end of the day.

21 I do want to talk about the diagnosis because I  
22 think --

23 THE COURT: You know what, here's my issue: You've  
24 now gone about almost a half an hour.

25 MR. GOLD: Oh, really? Oh, I'm --

1                   THE COURT: And it's a very important case, and I'm  
2 not trying to dispute it. What I'm going to have you do is go  
3 for five more minutes, you're going to finish up, and then I  
4 have to take a call at quarter of. Then we will come back  
5 here, and I don't know what else to do, and then I'll give you  
6 your time.

7                   MR. GOLD: And that's what I need, your Honor, so I  
8 think that's fine.

9                   THE COURT: All right, so five more minutes.

10                  MR. GOLD: But the diagnosis is important even if the  
11 Court were to find -- we invite the Court to say that the First  
12 Circuit decided its case in a particular point in time, that  
13 the psychiatric literature which we marched into the record is  
14 important and changes the nature of the evidence regarding  
15 that. We have three opinions on hebephilia. One is,  
16 Dr. Phenix says she can diagnose it through paraphilia not  
17 otherwise specified, and she can also diagnose it with  
18 reference to this criteria for the new DSM which is coming out.  
19 And she says, under either criteria, he qualifies as mentally  
20 disordered.

21                  Dr. Bard maintains the position that he had before,  
22 and Dr. Prentky has what we're characterizing as a  
23 middle-of-the-road sort of opinion. He finds that it's  
24 defensible to make the diagnosis at this point in time, but  
25 that based on his formulation of the case -- and this I

1 would -- I was reading Wetmore again. I keep going back to  
2 that because it's one of the most recent things I've read,  
3 that's basically -- and of course your Honor wrote it, but --

4 THE COURT: And, of course, your office had it for a  
5 while.

6 MR. GOLD: But that talking about, you know, what the  
7 DSM says, what it requires, you know, the thirteen-year-old  
8 threshold was an issue in that case. Here the diagnostic  
9 criteria, which are not even in place -- they're proposed,  
10 they're currently proposed for the psychiatric community to  
11 consider for this new diagnosis, you know -- and what  
12 Dr. Phenix is saying is, "Well, I can use this new one, or I  
13 can use this old backdoor way to do it." The new one has these  
14 three thirteen-year-olds as a psychiatric sort of -- as a  
15 criterion in the diagnosis.

16 Dr. Prentky says: The man's interest is in older  
17 teens. It's always been until older teens to youths. That's  
18 his interest. And so even if the Court decides, "The First  
19 Circuit had it buttoned up, and I'm not going to look at that  
20 anymore," it's still important because the nature of the  
21 diagnosis and who the person is is important when you consider  
22 what's likely to happen. Here is someone who the majority of  
23 his interactions have been with older people, who the docs are  
24 telling you are not pathological. He's carried on relationships  
25 with adult women, with older men, in addition to these teens.

1 And he's someone who has the outlets. He's not someone who's  
2 fixated or locked in some area which is necessarily criminal.  
3 That's a feature of who he is.

4 And it's also important when we consider his testimony  
5 about how he's not interested in carrying on with young  
6 individuals anymore. He doesn't want to. He felt that he  
7 identified with them. It gave him self-esteem to be someone  
8 who is more powerful than younger people, or whatever the  
9 dynamic was. He's not there anymore. And with someone like  
10 Mr. Carta who we have the record that we have, it's important.  
11 That's one reason why the diagnosis is important.

12 The other thing is, you know, the three  
13 thirteen-year-olds I don't think knock it out of the park for  
14 the government anymore. I want to go back to -- yes?

15 THE COURT: Let me just say, you gave me a 70-page  
16 brief.

17 MR. GOLD: I did, yes, 76.

18 THE COURT: And you're lucky that I didn't just strike  
19 it, other than I didn't want to have to reread something else,  
20 but you really need to finish this up, and I can just see  
21 you --

22 MR. GOLD: I'll close the door on the hebephilia.

23 THE COURT: I am not going to say that hebephilia is  
24 not a valid diagnosis, so you can reserve it for the record.  
25 I'm not going to overturn the First Circuit. I'm not going to

1 say that it's now an invalid diagnosis. I understand you want  
2 me to say that, in any event, he shouldn't be diagnosed with  
3 it.

4 MR. GOLD: Well, that's Prentky's position, that's  
5 right. That's right. I mean, and that's --

6 THE COURT: That's the Prentky position.

7 MR. GOLD: Right, that's the Prentky position.

8 I would just make two quick observations before moving  
9 on. One is that Dr. Bard pointed out conceptual problems with  
10 the diagnosis. What happened in this case was that those  
11 conceptual problems were borne out. First of all, it's our  
12 position that the framers of the DSM -- that is, Dr. Frances  
13 and Dr. First, who are the authors of one of the articles that  
14 we put into evidence -- essentially backed up his opinion in  
15 every jot and tittle. That's one point, and that bears  
16 mention.

17 The other is that the diagnosis, the criteria in this  
18 very case that the government has proposed have changed. In  
19 their briefing in the initial round of this case, they said  
20 it's thirteen to seventeen years old, that's the diagnostic  
21 window. Now the same expert has come back and has said, "Well,  
22 no, it's eleven to fourteen, and I've got the three  
23 thirteen-year-olds, so I'm still good," right? But I think  
24 Dr. Prentky's opinion is what we'd expect from a psychologist,  
25 someone who's giving the Court an informed formulation of the

1 case, which is that this man's area of interest is higher; the  
2 three thirteen-year-olds are contrary information, but they  
3 don't go against it.

4 THE COURT: Right, that's the Prentky --

5 MR. GOLD: That's the Prentky position. But what we  
6 argue in the papers, in the long papers that Dr. Phenix does is  
7 suddenly adjusts her opinion, and sort of without acknowledging  
8 it has changed the criteria by which she went about  
9 diagnosing -- you know, one clinician, two sets of diagnostic  
10 criteria.

11 And then I'll just end by reading a PowerPoint that we  
12 read into evidence during the first trial when I was  
13 cross-examining Dr. Phenix, where she did a presentation with  
14 the New Hampshire professionals who were going to be involved  
15 in the statute up there: "Serious difficulty with volition is  
16 defined by: Overcame obvious barriers such as victim protests,  
17 harm or pain; been detected in the past and reoffended; did not  
18 learn from experience or punishment; reoffended quickly after  
19 release; he said he had no or few controls; the offense was  
20 risky and he would be easily identified or caught; excessive  
21 numbers of offenses or victims." And we would argue that none  
22 of those factors apply to this case.

23 THE COURT: What were you just reading? It was --

24 MR. GOLD: Oh, this was a PowerPoint presentation that  
25 Dr. Phenix herself gave to operationalize "serious difficulty,"

1 that she herself said these are factors by which you might find  
2 serious difficulty controlling behavior, and it's notable that  
3 they're not present in Mr. Carta's case.

4 THE COURT: Thank you. I am going to have to take  
5 this conference call. Actually, you went longer than you  
6 thought, but that's fine. It's an important case. Do you have  
7 any problems if I take any commitments? We'll take fifteen  
8 minutes, twenty minutes, and then I will come back. I think  
9 that's probably the best way to handle this.

10 How long do you think your closing might be?

11 MS. SERAFYN: Twenty to thirty minutes.

12 THE COURT: Wow. Okay, all right.

13 THE CLERK: All rise.

14 (A recess was taken, 3:44 p.m.)

15 (Resumed, 4:10 p.m.)

16 CLOSING ARGUMENT BY MS. SERAFYN:

17 MS. SERAFYN: Your Honor, the government has proved by  
18 clear and convincing evidence that Todd Carta is a sexually  
19 dangerous person under the Adam --

20 THE COURT: Can I make a suggestion?

21 MS. SERAFYN: Yes.

22 THE COURT: Sit down.

23 MS. SERAFYN: It's okay, your Honor. It actually  
24 feels good to stand up a little bit -- that Todd Carta is a  
25 sexually dangerous person under the Adam Walsh Act. He's an

1 untreated sex offender who has a history of molesting teenage  
2 boys, including three thirteen-year-olds over a 30-year period.  
3 The vast majority of these offenses, your Honor, went  
4 undetected. He preyed on these young teenage boys by giving  
5 them drugs, alcohol, concert tickets, and often a place to  
6 live. This conduct went on for three decades until Mr. Carta  
7 was sent to prison in his early forties for possessing child  
8 pornography.

9 Now, Mr. Carta has admitted on several occasions,  
10 including his testimony during this trial, that he is still  
11 attracted to thirteen-year-old boys. Mr. Carta hasn't been  
12 treated for this criminal and deviant conduct. He participated  
13 in sex offender treatment for about seven months at Butner  
14 before dropping out because he couldn't handle it -- he said it  
15 was too intense -- and he continued his offense cycle in the  
16 sex offender treatment program by preying on the youngest  
17 members of his treatment group, who were young-looking men in  
18 their very early twenties.

19 Now, the evidence in this case shows, your Honor, and  
20 indeed I think common sense shows, that Mr. Carta is a sexually  
21 dangerous person who needs to be committed for sex offender  
22 treatment. And your Honor is familiar with the three elements  
23 of the Adam Walsh Act, and, as you know, this case was remanded  
24 from the First Circuit, and so we believe there's only one  
25 issue that the Court needs to decide, and that is the third

1 element. So there's no dispute that Mr. Carta meets the first  
2 element; he acknowledges that he has committed sexually violent  
3 conduct or child molestation in the past.

4 And while Mr. Carta does dispute that he meets the  
5 second element, the First Circuit has already decided that  
6 issue. The First Circuit has found that paraphilia not  
7 otherwise specified characterized by hebephilia is a legitimate  
8 mental diagnosis, and the First Circuit found that the  
9 government met the mental element of the statute and remanded  
10 the case for this Court to consider, quote, "whether the  
11 requisite dangerousness exists." And, your Honor, we all know  
12 that requisite dangerousness is the third element of the  
13 statute.

14 So it's the government's position that the only  
15 question for this Court to decide is whether Mr. Carta would  
16 have serious difficulty in refraining from sexually violent  
17 conduct or child molestation if released, and on that issue,  
18 your Honor, you heard from four witnesses. You heard from  
19 three experts and from Mr. Carta.

20 So the first expert that you heard from was Dr. Amy  
21 Phenix, who is the government's expert in this case, and  
22 Dr. Phenix opined to a reasonable degree of professional  
23 certainty that Mr. Carta would have serious difficulty in  
24 refraining from sexually violent conduct or child molestation  
25 if released. And she reached this conclusion by scoring three

1 actuarial instruments: She scored the Static-99R, the  
2 Static-2002R, and the MnSOST-R.

3 Now, the average score on the Static-99R is a 2.

4 Mr. Carta's score was a 5, which placed him in the moderate-  
5 high risk range. So I just wanted to be clear about that, your  
6 Honor, because I know when Attorney Gold was giving his  
7 closing, your Honor was referencing that Mr. Carta is only in  
8 the moderate range, but on the Static-99R, he actually falls in  
9 the moderate-high range.

10 The average score on the Static-2002R is a 4.

11 Mr. Carta's score on that instrument was a 6, which places him  
12 in the moderate risk range. And Mr. Carta's score on each of  
13 these three instruments showed that he was at moderate to  
14 moderate-high risk for sexual recidivism, and as your Honor  
15 knows from this case and others --

16 THE COURT: What was the MnSOST-R? That was moderate?

17 MS. SERAFYN: The MnSOST-R actually I believe was  
18 high, your Honor. In Dr. Phenix's report -- yes, and it's also  
19 actually in our findings of fact -- he scored a 10 on the  
20 MnSOST-R, which places him in the high risk range.

21 MR. GOLD: If I might interject, your Honor, I'm  
22 sorry, but that's the scoring that she corrected on the stand  
23 as -- she made the same error at both trials, so she rescored  
24 it from high to moderate at the first trial. Then she said she  
25 transposed her score from the one report to the other, and then

1       she corrected it again on cross-examination in the second  
2       trial.

3            MS. SERAFYN: Well, I believe, your Honor, that --

4            THE COURT: Well, wait. So she corrected, in your  
5       view, to moderate?

6            MR. GOLD: That's right.

7            MS. SERAFYN: Your Honor, I believe that the scoring  
8       error was that she had originally scored an 11, and then she  
9       reduced it by one point to a 10. But I thought that the risk  
10      range didn't change; it was only the raw number that actually  
11      changed.

12           So, your Honor, on these three instruments, Mr. Carta  
13      scored in the moderate to moderate-high risk range to reoffend.  
14      And as we know from this case and others, these actuarial  
15      instruments actually underpredict sexual recidivism, and that's  
16      because the numbers are based on reconviction rates. And as we  
17      know, most sex offenses or a majority of sex offenses go  
18      undetected, and this case is the perfect example of that.  
19      Virtually all of Mr. Carta's sex offenses went undetected for  
20      thirty years, so these actuarial instruments don't capture the  
21      kinds of sex offenses that allude law enforcement, or even the  
22      kinds of sex offenses for which a conviction doesn't result.

23           So Dr. Phenix, though, didn't just look at the  
24      actuarials. She then considered dynamic risk factors, and she  
25      considered dynamic risk factors that are empirically

1 established to determine whether Mr. Carta would have serious  
2 difficulty in refraining. So specifically she looked at  
3 significant social influences, and she found that Mr. Carta has  
4 no meaningful relationships with anyone in his family. He  
5 threatened to kill his own mother, he threatened to kill his  
6 own daughter, and in fact he has no relationship with his now  
7 adult daughter.

8                   The last sexual relationship that Mr. Carta had before  
9 he went to prison in 2002 was with his teenage daughter's  
10 seventeen-year-old boyfriend, Seth, and Mr. Carta had a sexual  
11 relationship with Seth for over a year behind his daughter's  
12 back. And then, out of spite, when Mr. Carta was in prison, he  
13 told his daughter about his relationship with Seth because he  
14 wanted Seth to leave his daughter and to return to Mr. Carta.

15                   So Dr. Phenix also looked at intimacy deficits, and  
16 she found that Mr. Carta has significant intimacy deficits.  
17 He's never maintained a long-term relationship with a peer-age  
18 individual. When he was in his late thirties and forties, he  
19 had sexual relationships with teenage boys. He emotionally  
20 identifies with children, especially pubescent boys in that  
21 thirteen-year-old age range. And Dr. Phenix testified during  
22 the trial that as they sat there, Mr. Carta does not have the  
23 skills to develop a meaningful relationship that would serve as  
24 a protective factor against sexual recidivism if he were  
25 released.

1           Other dynamic factors that Dr. Phenix looked at were  
2 general self-regulation and sexual self-regulation, and she  
3 found that during his time in the community Mr. Carta was  
4 largely out of control sexually. He was obsessed with child  
5 pornography, amassing up to 50,000 images at its peak; and  
6 those images were of children ranging in age from three years  
7 old, basically a child in diapers, to age seventeen. At its  
8 peak, he viewed this child pornography for 12 to 14 hours a  
9 day, at the expense of going to work and at the expense of  
10 taking care of his hygiene and doing basic things like  
11 showering. He was completely obsessed with viewing child  
12 pornography.

13           So each of these dynamic risk factors that Dr. Phenix  
14 looked at are empirically linked to increased sexual  
15 recidivism. And Dr. Phenix found, and she testified, that all  
16 of the relevant dynamic risk factors are present for Mr. Carta,  
17 and therefore his risk of sexual recidivism is increased beyond  
18 the actuarial instruments.

19           So, your Honor, we believe that Dr. Phenix's testimony  
20 is the testimony that should be credited in this case. She's  
21 one of the leading experts in the country in the field of sex  
22 offender recidivism. She's coauthored the coding manuals for  
23 the most widely used and widely validated instruments, which  
24 are the Static-99, now the Static-99R, and the Static-2002R.  
25 She diagnosed Mr. Carta with five mental disorders that are

1 listed in the DSM-IV. She scored the most widely --

2 THE COURT: Which one are you pressing?

3 MS. SERAFYN: The paraphilia NOS characterized by  
4 hebephilia, but we do believe that all of the diagnoses are  
5 relevant.

6 She also considered dynamic risk factors. She  
7 considered protective risk factors, which would work in  
8 Mr. Carta's favor, and found that no protective risk factors  
9 were present here. And based on all of these considerations,  
10 based on all of these sort of pieces of the puzzle, Dr. Phenix  
11 opined that Mr. Carta would have serious difficulty in  
12 refraining from sexually violent conduct or child molestation  
13 if released.

14 Now, the other two experts that you heard from in this  
15 case, Dr. Prentky, who is Mr. Carta's chosen expert, and  
16 Dr. Leonard Bard, who is the Court-appointed expert, simply  
17 aren't credible, your Honor. The risk assessment that  
18 Dr. Prentky performed in this case was sloppy at best. He  
19 acknowledged that Mr. Carta had oral sex with an intoxicated  
20 thirteen-year-old boy when Mr. Carta was twenty-eight years  
21 old. He acknowledged that Mr. Carta engaged in sexual activity  
22 with a thirteen-year-old boy on at least thirty to forty  
23 occasions when Mr. Carta was thirty years old, and he also  
24 acknowledged that Mr. Carta engaged in sexual activity with a  
25 thirteen-year-old boy when Mr. Carta was in his thirties.

1 Now, Dr. Prentky also admitted that Carta's sexual  
2 activity with these three thirteen-year-old boys would qualify  
3 as hebephilic activity, and he acknowledged that paraphilia NOS  
4 characterized by hebephilia is a legitimate diagnosis. But he  
5 didn't diagnose Mr. Carta with hebephilia. And why didn't he  
6 diagnose Mr. Carta with hebephilia, even though he essentially  
7 acknowledged that Mr. Carta met all of the criteria for this  
8 diagnosis? Well, Dr. Prentky didn't diagnose Mr. Carta with  
9 hebephilia because he chose to ignore overwhelming evidence of  
10 Mr. Carta's sexual interest and attraction to thirteen-year-old  
11 boys in favor of crediting Mr. Carta's statements to  
12 Dr. Prentky. So Dr. Prentky interviewed Mr. Carta, and he  
13 asked him to describe his ideal sexual partner, and Mr. Carta  
14 said, and this is a quote from Dr. Prentky's report, "I like  
15 younger-looking guys. I am attracted to a certain body type.  
16 I like guys that are thin, youthful-looking with a lot of  
17 energy."

18 So based on this one statement, Dr. Prentky determined  
19 that Carta's ideal partner is a pubescent male in the age range  
20 of fifteen to twenty years old. So Dr. Prentky didn't diagnose  
21 Carter with hebephilia because he chose to take his word over  
22 the overwhelming evidence.

23 THE COURT: Well, wouldn't it be fair to say he's  
24 interested in thirteen-year-olds, but he's also interested in  
25 seventeen-year-olds and twenty-year-olds?

1 MS. SERAFYN: I think you could say that, but I think  
2 Dr. Prentky ignores that. I don't think Dr. Prentky admitted  
3 that Mr. Carta was sexually attracted to thirteen-year-olds,  
4 and that's why we believe his risk assessment was sloppy. I  
5 think he ignored the evidence that he, frankly, didn't want to  
6 see. But I do think it's fair, based on Mr. Carta's history  
7 with other teenage boys, that he does have an attraction to  
8 boys in the thirteen, fourteen, fifteen --

9 THE COURT: Thirteen, fifteen, seventeen, twenty.

10 MS. SERAFYN: That's right.

11 THE COURT: I mean, all of them. So what I've been  
12 trying to think about was, does that mean that, if given the  
13 right therapy, he could substitute his interest in  
14 thirteen-year-olds for interest in seventeen- -- well,  
15 twenty-year-olds?

16 MS. SERAFYN: I think it's certainly possible, your  
17 Honor, and that, I think, is an important part of this case  
18 because Mr. Carta has never had that therapy, he's never had  
19 that sex offender treatment; and he admitted to you during this  
20 trial that he still is attracted to thirteen-year-old boys.

21 THE COURT: Right. So the question for me that I have  
22 to struggle with, as you said, is the controls: Could he do  
23 that in supervised release and then just date twenty-year-olds?

24 MS. SERAFYN: Right, and --

25 THE COURT: As opposed to some of the other people I

1 have who are just obsessed with children.

2 MS. SERAFYN: Right, and we think, your Honor, that he  
3 can't do that on supervised release because he couldn't do it  
4 when he was in prison. He couldn't do it when it was easiest  
5 for him. He couldn't do it when he was on a unit where the  
6 treatment was right there for him on his unit, where his  
7 therapist was available to him 24-7, where he had an extensive  
8 support group, where there were no thirteen-year-olds in  
9 prison. He couldn't do it then in that kind of controlled  
10 environment, and the odds are only going to be much more  
11 stacked against him if he's released and he has to, you know,  
12 walk or ride past a school or a playground to be able to get to  
13 treatment, where treatment isn't as intense, where he may not  
14 have the same kind of support that he had while he was in  
15 prison, and, frankly, where he's going to have so many other  
16 temptations. Theoretically, he would have access to child  
17 pornography, he would have access to drugs and alcohol, the  
18 kinds of things that have been disinhibitors for him in the  
19 past. And those sorts of things weren't present in prison, and  
20 he wasn't able to succeed in treatment because he voluntarily  
21 withdrew after seven months. So we would argue that he does  
22 need treatment, but he needs inpatient treatment essentially at  
23 Butner with Dr. Hernandez, as opposed to, you know, something  
24 that's less frequent and less intense out in the community.

25 THE COURT: So he couldn't make it last time, so what

1 makes you think that that would be a better option this time?

2 It's the same program, right?

3 MS. SERAFYN: It is the same program, your Honor. I  
4 think -- I say it's the same program in the sense that it's the  
5 sex offender treatment program at Butner.

6 THE COURT: Butner with Hernandez.

7 MS. SERAFYN: With Dr. Hernandez. I'm not sure that  
8 that same program in terms of the curriculum was in place the  
9 first time around. I think Mr. Carta went through that program  
10 in 2006, which, you know, these trials didn't happen until  
11 2009.

12 THE COURT: So you're saying they're better programs  
13 now?

14 MS. SERAFYN: I think they're better, and I think, as  
15 we've seen from the Shields case and as we've seen from the  
16 Hunt case, which is the case that Mr. Gold referenced when he  
17 talked about a client that he has down there, I tried that case  
18 as well, and Mr. Hunt is getting out shortly, I think in July.  
19 We just had a conference call with Dr. Hernandez about that.  
20 So two of the three sex offenders -- I mean, there's only been  
21 three sex offenders in the entire country committed under the  
22 Adam Walsh Act: Mr. Shields, who your Honor just released  
23 under conditions, Mr. Hunt, who's about to be released, and  
24 Mr. Wetmore, who just got down there. So I think it's a bit  
25 disingenuous for --

1                   THE COURT: They're all moving down to North Carolina,  
2 right, all these cases?

3                   MS. SERAFYN: They are, your Honor. I think it's a  
4 bit disingenuous for Mr. Gold to suggest that, as he did in the  
5 beginning of his remarks, that these people potentially could  
6 be committed for life. I understand that that often is the  
7 case on the state side, which is where Mr. Gold came from, but  
8 in the two cases that we've seen so far, both of the sex  
9 offenders are getting out within a span of, you know, two years  
10 or less. So I don't think it's a situation where, you know,  
11 we're going to lock a sex offender up and throw away the key.  
12 I do think that Dr. Hernandez's program is a good one, and  
13 we've seen these offenders progress through treatment and  
14 actually be released or on their way to being released.

15                   So getting back to Dr. Prentky and his ignoring all of  
16 the evidence in this case, I just want to give the Court some  
17 examples of the kind of evidence that Dr. Prentky ignored.  
18 While Mr. Carta was in Butner in 2006, he said that his primary  
19 attraction was to thirteen- to seventeen-year-old males, and  
20 that comes from Exhibit 25 which is in evidence. Dr. Prentky  
21 ignored this admission. At the same time, Mr. Carta said that  
22 he is most attracted to boys who are in the midst of puberty  
23 who are developing secondary sexual characteristics and who can  
24 achieve orgasm. Dr. Prentky ignored that. That also comes  
25 from Exhibit 25.

1                   In his SOTP homework, which is Exhibit 27, Mr. Carta  
2 noted that his preferred age range were males ranging in age  
3 from thirteen to twenty-eight years old. Again, Dr. Prentky  
4 ignored this evidence. And also in his SOTP homework, which is  
5 the sex offender treatment program homework, one of the  
6 questions was, "What was your age preference in child  
7 pornography?" and Mr. Carta wrote children ages twelve to  
8 seventeen were his first preference. His second preference  
9 were children ages seven to eleven. Again, Dr. Prentky ignored  
10 this evidence.

11                   So since Mr. Carta made these admissions about his  
12 preferred age range being boys in the twelve- to  
13 seventeen-year-old range, Mr. Carta sat through a trial before  
14 Judge Tauro, and during that trial he heard testimony about  
15 hebephilia, and that the definition of hebephilia is  
16 adolescents going through puberty, and that the sort of age  
17 range for puberty is eleven to fourteen years old. Well, we've  
18 heard testimony that Mr. Carta is a smart guy, he's got a  
19 fairly high IQ; and now, conveniently, after he sat through the  
20 first trial that Dr. Prentky was not involved in, he told  
21 Dr. Prentky during an interview that his preferred age range is  
22 fifteen, just beyond the definitional cusp of hebephilia.  
23 Hebephilia is eleven to fourteen. He now says that he's most  
24 attracted to boys age fifteen and up, despite all of the  
25 admissions that we saw from 2006 suggesting otherwise,

1 suggesting that twelve- and thirteen-year-olds were actually  
2 his primary sexual attraction.

3 So, your Honor, Dr. Prentky didn't just ignore  
4 hebephilia as a diagnosis; he also ignored Mr. Carta's long  
5 history of substance abuse and antisocial personality disorder.  
6 He acknowledged, though, that most of Mr. Carta's teenage boy  
7 victims were actually on drugs or alcohol when Mr. Carta  
8 molested them. And Dr. Prentky also acknowledged that it was  
9 Mr. Carta who gave the boys drugs and alcohol in order to  
10 sexually molest them; yet he didn't diagnose Mr. Carta with any  
11 substance abuse disorders. Dr. Prentky also admitted that  
12 Mr. Carta could be diagnosed with antisocial personality  
13 disorder, but he didn't think that diagnosis was relevant to  
14 the case, so he didn't make it.

15 So Dr. Prentky's sloppy risk assessment continued  
16 beyond the diagnosis or the failure to make any diagnoses in  
17 this case when he scored the actuarial instruments. Dr. Prentky  
18 scored the Static-99 and gave Mr. Carta a score of 6, which  
19 places Carta in the high-risk category; yet Dr. Prentky didn't  
20 score the Static-99R, even though the developers of the  
21 instrument have said that the Static-99R should replace the  
22 original Static-99.

23 Dr. Prentky determined that Mr. Carta scored a 6,  
24 scored in the high-risk category; yet for some inexplicable  
25 reason he completely ignored that score and didn't factor it

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1 into his risk assessment. And in addition to the Static-99,  
2 Dr. Prentky also scored an instrument called the SVR-20. Now,  
3 he acknowledged that the SVR-20 is not an actuarial instrument.  
4 He acknowledged that he didn't know whether this instrument had  
5 ever been used in an Adam Walsh Act case before. He admitted  
6 that the SVR-20 is only occasionally used in risk assessments,  
7 and he also acknowledged that the Static-99 is the most widely  
8 used instrument and also the most widely validated instrument.

9 So, your Honor, you should not credit Dr. Prentky's  
10 testimony in this case because he ignored overwhelming evidence  
11 that Mr. Carta is sexually attracted to thirteen-year-old boys,  
12 he ignored the high score that Mr. Carta received on the  
13 Static-99, and he didn't consider any dynamic risk factors as  
14 part of his risk assessment.

15 Now, Dr. Prentky's entire opinion that Mr. Carta is  
16 not sexually dangerous is based simply on Mr. Carta telling  
17 him, "I am most attracted to boys in the age range of fifteen  
18 to twenty," and Dr. Prentky bases his opinion on nothing more  
19 than that. He chooses to credit Mr. Carta's self-report over  
20 all of the evidence in this case.

21 And just as the Court should discredit Dr. Prentky's  
22 opinion, we believe that the Court should also discredit  
23 Dr. Bard's, which is even further afield than Dr. Prentky's.  
24 Like Dr. Prentky, Dr. Bard didn't diagnose Mr. Carta with any  
25 mental illness, abnormality, or disorder, but at least

1 Dr. Prentky acknowledged that paraphilia NOS characterized by  
2 hebephilia is a legitimate diagnosis in the field. Dr. Bard  
3 wouldn't even admit to that. Dr. Bard recognizes that there  
4 are practitioners/clinicians in the field who have adopted this  
5 definition of hebephilia, but he doesn't agree with it, which  
6 shows that Dr. Bard is a complete outlier in the field, by far  
7 in the minority in terms of acknowledging that hebephilia is a  
8 legitimate diagnosis.

9 Dr. Bard also testified that it's not a mental  
10 illness, abnormality, or disorder for someone to be attracted  
11 to, to groom, to stalk, and to have sex with thirteen-year-old  
12 boys. And, your Honor, you don't need to be a qualified  
13 expert, you don't need to have a Ph.D. to know that that just  
14 doesn't make sense; yet that's what Dr. Bard would have you  
15 believe.

16 Now, as part of his risk assessment, Dr. Bard scored  
17 both the original Static-99 and the Static-99R, and he found  
18 that Carta's scores on these instruments placed him in the  
19 moderate-high risk range for sexual recidivism; yet he too  
20 chose to ignore these scores. So now you have two experts who  
21 for some reason are scoring the most widely used and validated  
22 instruments; yet when they get high scores, they choose to just  
23 completely disregard them.

24 THE COURT: So suppose you have a range of these  
25 actuarial instruments between moderate and moderate to high,

1 what significance does that have in the "clear and convincing"  
2 analysis?

3 MS. SERAFYN: Your Honor, I think it's but one piece  
4 of the puzzle. Unfortunately, Congress didn't give the courts  
5 or any of us any guidance as to what the numbers mean. So, for  
6 example --

7 THE COURT: When it's high, that sort of clearly  
8 points in your direction. When it's moderate or moderate to  
9 high, it's less clear what it means.

10 MS. SERAFYN: It may seem less clear, but we believe  
11 that if you look at Dr. Phenix's opinion, because she didn't  
12 just rely on the actuarials and she looked at other things like  
13 the dynamic risk factors --

14 THE COURT: Those are the subjective things. I mean,  
15 at the end of the day, then I'm not relying on an instrument;  
16 I'm relying on the kinds of things I rely on every day in  
17 court, common-sense factors.

18 MS. SERAFYN: That's true, but I would say that you're  
19 just not exclusively relying on the instruments. You're taking  
20 them into consideration, and then you're looking at all of the  
21 other factors, and then, when you're looking at the totality,  
22 you're saying this evidence shows that he will have serious  
23 difficulty.

24 THE COURT: It stops being so wooden. It's not like a  
25 science, if you will, because the actuarial instrument isn't so

1 definitive here. You have to look at dynamic risk factors.

2 MS. SERAFYN: We believe that the dynamic risk factors  
3 do shed important light on Mr. Carta.

4 THE COURT: Sure, and they cut -- I understand that,  
5 but that means it's judgments that I make. It's not like a  
6 scientific silver bullet.

7 MS. SERAFYN: That's true, except that of course these  
8 dynamic factors are empirically validated and show that if you  
9 have all of these dynamic risk factors, you are at increased  
10 risk to reoffend. So the scores on the --

11 THE COURT: Well, they missed some of them. Some of  
12 them he doesn't have. Like, he didn't reoffend after a  
13 sanction and he didn't reoffend after treatment, which made the  
14 other cases so easy. You know, you give treatment, and then  
15 someone reoffends anyway. Here it's harder, it's harder. And  
16 he now says he wants treatment. Is that a dynamic risk factor?  
17 I mean, you know, it starts becoming my judgments. As you say,  
18 it's a holistic look at this.

19 MS. SERAFYN: Well, I mean, a couple of responses  
20 there, your Honor. First, Dr. Phenix testified that Mr. Carta  
21 did have all of the dynamic risk factors. I don't know exactly  
22 what this PowerPoint is that Mr. Gold ended with except that I  
23 know that Dr. Phenix has given presentations about state  
24 statutes. I don't think this presentation to New Hampshire was  
25 about the Adam Walsh Act. They've never had as far as I know

1 an Adam Walsh --

2 THE COURT: It's common sense, right?

3 MS. SERAFYN: Sort of common sense, but many of the  
4 state statutes differ. There are some state statutes that are  
5 phrased as "more likely than not," which suggests that if the  
6 actuarials are sort of 51 percent, that that tips the balance.  
7 So I don't think those risk factors or those bullet points are  
8 relevant to this case here. Dr. Phenix found that he had all  
9 of the dynamic risk factors.

10 And this idea that Mr. Carta hasn't been sanctioned,  
11 then gone on to reoffend, I think is a bit illogical in this  
12 case. Mr. Carta hasn't been sanctioned and gone on to reoffend  
13 because all of his sex offenses went undetected, so --

14 THE COURT: Sure. I'm just saying, when you have  
15 someone like with Shields or Wetmore or -- the other guy was,  
16 for me anyway, was very different -- but, you know, then you  
17 almost have a slam dunk: The treatment didn't work, he went  
18 back and did it anyway, so he's serious. I mean, here we don't  
19 have that, that's all, not that we have the opposite. We just  
20 don't have it. It's not as easy.

21 MS. SERAFYN: I don't think we have it necessarily  
22 just from one source, but I do think that it's a slam dunk when  
23 you look at all of the sources and when you look at all the  
24 factors.

25 THE COURT: All right, I get your point. You need to

1 wrap up in five minutes or so.

2 MS. SERAFYN: So, your Honor, like Dr. Prentky,  
3 Dr. Bard chose to rely on Mr. Carta's statements to him rather  
4 than on all of the evidence of his decades-long sexual  
5 molestation of thirteen-year-old boys and his own admission  
6 that he preferred thirteen- to seventeen-year-old boys.

7 Now, in addition to the three experts in this case,  
8 you also heard from Mr. Carta, and I think the most important  
9 thing about Mr. Carta's testimony was his response to a  
10 question that your Honor actually asked him. And this comes  
11 from the Trial Day 4, the transcript from March 21, 2011, and  
12 your Honor asked him: "Are you still attracted to  
13 thirteen-year-olds?" And Mr. Carta answered, "You know, your  
14 Honor, I don't know. I'm not going to sit here and lie and say  
15 no, but I can't -- I mean, I see them on TV all the time. I  
16 look at him and I say, 'Oh, he's good-looking,' but as far as  
17 sex goes it's in my mind that -- that -- you know, it's  
18 off-limits."

19 And then, "THE COURT: I don't want to put words in  
20 your mouth. So you're still attracted to them. But what  
21 you're saying is, you've been through so much, you would never  
22 act on it. Is that what you're telling me?

23 "THE WITNESS: Yeah. I would say I still had an  
24 attraction. I mean, I don't know. I'm not around any  
25 thirteen-year-olds so, I mean, I feel like I don't, but I can't

1 be honest and say that. It's not an honest statement if I say  
2 I'm not attracted to them. I don't know if that's honest or  
3 not. We've got guys in prison that, you know, there ain't no  
4 thirteen-year-olds in prison. A lot of these kids, you know,  
5 they're ready, sex-wise they're ready."

6 So Mr. Carta acknowledged to you during this trial  
7 that he remains interested in thirteen-year-old boys, he  
8 remains attracted to them, and that he believes that they're  
9 still ready for sex.

10 Mr. Carta went beyond that, though. When he was on  
11 the stand, he continued to demonstrate cognitive distortions,  
12 and he continued to minimize his sexual activity with  
13 thirteen-year-old boys. He would have you believe that these  
14 thirteen-year-old boys are basically coming up to him, taking  
15 off their clothes and initiating sexual contact with him. For  
16 example, he testified that after he got into a fight with his  
17 seventeen-year-old boyfriend Fred, that Fred's fifteen-year-old  
18 brother walked into Carta's room, climbed into bed with him and  
19 told him that he'd do anything to be with Carta, and it was  
20 only at that time that Mr. Carta started performing oral sex on  
21 a fifteen-year-old boy.

22 Mr. Carta also testified about the time that his  
23 teenage daughter and her seventeen-year-old boyfriend Seth were  
24 living with him. He said that one day his daughter went to  
25 work, and Seth suddenly started taking off his clothes and

1 asked Carta, "You're gay, aren't you? Why don't we have sex."  
2 And it was only then that Carta, quote, "gave in" and had sex  
3 with Seth, and then went on to have sex with Seth for over a  
4 year without telling his daughter.

5 And Mr. Carta would also have you believe that when he  
6 was living in California following the Grateful Dead, that he  
7 was in his van one day when thirteen-year-old John came  
8 knocking on his van door. It was raining out. John was wet.  
9 Mr. Carta gave him a blanket, and John immediately started  
10 masturbating, and it was only then that Mr. Carta performed  
11 oral sex on him. So even on the stand during trial he's  
12 minimizing his role in preying on these boys, in stalking them,  
13 in offering them drugs and alcohol, and essentially grooming  
14 them to have sex with him. He wants you to believe that  
15 they're just completely disrobing and throwing themselves at  
16 Mr. Carta and that's when the sexual contact begins.

17 Now, your Honor, I just want to talk a little bit  
18 about treatment. The evidence shows, I mentioned earlier, that  
19 Mr. Carta dropped out of treatment after about seven months  
20 after he completed two of the four phases. Well, the first  
21 phase of treatment is orientation; the second phase of  
22 treatment is an evaluation. Mr. Carta dropped out of treatment  
23 before the real kind of serious hard look at himself even took  
24 place. And the reason why he dropped out of treatment is  
25 because he gravitated towards the youngest members who were in

1 the treatment group.

2 Now, of course these were men because there are no  
3 children in prison. As Mr. Carta acknowledged, "There ain't  
4 any thirteen-year-olds in prison," so he picked the  
5 youngest-looking members, nineteen-, twenty-,  
6 twenty-one-year-old guys, and under the guise of mentoring  
7 them, he was repeating his offense cycle. He was grooming  
8 them. He admitted that he was sexually attracted to them. So  
9 in prison we have him mirroring the offense cycle that he was  
10 actually participating in while he was out in the community.

11 When Dr. Wood confronted Mr. Carta about this behavior, he  
12 couldn't take it, he felt that treatment was too intense, and  
13 he ended up dropping out of treatment.

14 So in Dr. Phenix's opinion, the fact that Mr. Carta  
15 dropped out of treatment actually increases his risk of sexual  
16 reoffense. And even Dr. Bard acknowledged that failure to  
17 complete sex offender treatment increases risk of recidivism.  
18 And Dr. Bard also acknowledged that seven months is not enough  
19 time to complete sex offender treatment. Yet now Mr. Carta  
20 wants you to believe that he'll get sex offender treatment, the  
21 kind that he needs, if he is released to the community, and,  
22 your Honor, this just doesn't make sense. For many of the  
23 reasons that I mentioned earlier, he's going to have access to  
24 the disinhibitors -- the alcohol, the drugs, the child  
25 pornography -- that he simply didn't have access to in prison.

1           If Mr. Carta is released to the community, your Honor,  
2   he's being released as an untreated sex offender, an untreated  
3   sex offender who will have serious difficulty in refraining  
4   from sexually violent conduct or child molestation, an  
5   untreated sex offender who even today remains attracted to  
6   thirteen-year-old boys. He's got a deviant interest in young  
7   boys that he admits he's had his entire life. He's an  
8   untreated sex offender with no relapse prevention plan, no  
9   place to live, no family support, and essentially no skills to  
10   manage his sexual deviance; and we believe that it's much more  
11   realistic for him to get those skills, to get that treatment at  
12   Butner with Dr. Hernandez than it is if he were released to the  
13   community.

14           So, your Honor, there's ample support in the record,  
15   particularly from Dr. Phenix's report and her testimony, that  
16   Mr. Carta would have serious difficulty in refraining from  
17   sexually violent conduct or child molestation if released, and  
18   we believe that the government has proved this by clear and  
19   convincing evidence, and we ask the Court to commit Mr. Carta  
20   as a sexually dangerous person under the Adam Walsh Act.

21           THE COURT: Thank you. I'll take this matter under  
22   advisement. I want to thank you both, both sides actually, for  
23   excellent advocacy. I thought the briefing was amazing and the  
24   level of effort put into this was as well. As I've said  
25   throughout, it is a harder case than the other three, and I'm

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1 not sure what I'm going to do, so I take this under advisement.

2 MS. PIEMONTE-STACEY: Thank you, your Honor.

3 THE CLERK: All rise.

4 (Adjourned, 4:45 p.m.)

5 C E R T I F I C A T E

6

7 UNITED STATES DISTRICT COURT )  
8 DISTRICT OF MASSACHUSETTS ) ss.  
9 CITY OF BOSTON )  
10

11 I, Lee A. Marzilli, Official Federal Court Reporter,  
12 do hereby certify that the foregoing transcript, Pages 1  
13 through 56 inclusive, was recorded by me stenographically at  
14 the time and place aforesaid in Civil Action No. 07-12046-PBS,  
15 United States of America v. Todd Carta, and thereafter by me  
16 reduced to typewriting and is a true and accurate record of the  
17 proceedings.

18 In witness whereof I have hereunto set my hand this 30th  
19 day of June, 2011.

20

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22

23

24

/s/ Lee A. Marzilli

25

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LEE A. MARZILLI, CRR  
OFFICIAL COURT REPORTER